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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JAMES D. KROL

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Appeal 2011-002261  
Application 10/692,857  
Technology Center 1700

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Before CHUNG K. PAK, LINDA M. GAUDETTE, and  
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

## DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's decision<sup>1</sup> finally rejecting claims 11-15 and 22-36, the only claims pending in the Application.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

Claims 11 and 22 are representative of the invention and are reproduced below from the Claims Appendix to the Appeal Brief:

11. A crustless pizza without a traditional dough crust layer comprising:

a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese; and

at least one food layer on top of said base layer, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza having a dough crust.

22. A method of making a crustless pizza without a traditional dough crust layer comprising the following sequence of steps:

preparing a dry formulated flour mixture comprising a high gluten flour and a baking powder;

distributing a pre-measured amount of said dry formulated flour mixture evenly onto a cooking pan;

distributing a pre-measured amount of a cheese evenly over said dry formulated flour mixture, wherein said dry formulated flour mixture and said cheese form a base layer;

distributing a pre-measured amount of a pizza sauce or a tomato sauce evenly over and on top of said base layer;

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<sup>1</sup> Final Office Action mailed Sep. 7, 2006.

<sup>2</sup> Appeal Brief filed Apr. 12, 2010 ("App. Br.").

adding and distributing evenly a pre-measured amount of at least one food layer over and on top of said pizza sauce or said tomato sauce; and

baking said crustless pizza for a suitable time and at a suitable temperature, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza having a dough crust.

Appellant requests review of the following grounds of rejection (App. Br. 7):

1. claims 11-15 under 35 U.S.C. § 112, second paragraph, as indefinite (Ans.<sup>3</sup> 3); and
2. claims 11-15 and 22-36 under 35 U.S.C. §103(a) as unpatentable over the article of recipes for “Crustless Pizza”<sup>4</sup> in view of the Google Groups disclosure<sup>5</sup> (Ans. 4-8).

*Rejection of claims 11-15 under 35 U.S.C. §112, second paragraph, as indefinite*

The issue we consider with respect to the rejection under 35 U.S.C. §112, second paragraph, is: Did the Examiner reversibly err in determining that the claim 11 phrase “non-liquid ingredients” renders claims 11-15 indefinite?

The Examiner maintains the phrase “non-liquid ingredients” is indefinite because it is not clear what ingredients are excluded or included. (Ans. 3.) In support of the rejection, the Examiner notes the Specification discloses the base layer may include vegetables and fruits which are known to contain water. (*Id.*)

Appellant directs us to Specification paragraphs [00018] and [00019] and the Examples found on Specification pages 14-17, as well as *The American Heritage Dictionary of the English Language* and a NASA publication (*see App.*

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<sup>3</sup> Examiner’s Answer mailed Jul. 7, 2010.

<sup>4</sup> “Crustless Pizza”, *Pizza – Low Carb*, <http://dreampharm.com/food/helpful-recipes-081803.2943.html> (last visited Aug. 03, 2005).

<sup>5</sup> Posting of Stuart Pedazzo to alt.food.diabetic in *Google Groups Discussion Thread*, [http://groups.google.com/group/alt.food.diabetic/browse\\_thread/...](http://groups.google.com/group/alt.food.diabetic/browse_thread/...) (Tue, Apr. 2003, 23:15:04).

Br. Evidence Appx.), in support of a contention that one of ordinary skill in the art would understand that a non-liquid ingredient in a crustless pizza is a food item that does not have a readiness to flow, or take the shape of its container. (*See generally*, App. Br. 10-12.) Appellant contends one of ordinary skill of the art would readily understand from the Specification that foods containing water, such as vegetables and fruit, are “non-liquid ingredients” because they do not flow (*id.* at 12), and are clearly distinguishable from water or milk which are explicitly identified as liquid (*id.* at 10 (citing Spec. [00018] and [00019])).

A claim satisfies the definiteness requirement of 35 U.S.C. § 112, second paragraph, when one skilled in the art understands the claim parameters as read in light of the specification. *BJ Servs. Co. v. Halliburton Energy Servs.*, 338 F.3d 1368, 1372 (Fed. Cir. 2003) (quoting *Union Pac. Res. Co. v. Chesapeake Energy Corp.*, 236 F.2d 684, 692 (Fed. Cir. 2001) (“The definiteness inquiry focuses on whether those skilled in the art would understand the scope of the claim when the claim is read in light of the rest of the specification.”)).

Appellant has persuasively demonstrated that a preponderance of the evidence favors a determination that the ordinary artisan would understand the meaning of the claim 11 term “non-liquid ingredients” when read in light of the Specification. Therefore, we conclude the Examiner reversibly erred in determining that the claim 11 phrase “non-liquid ingredients” renders claims 11-15 indefinite.

The rejection of claims 11-15 under 35 U.S.C. § 112, second paragraph, is reversed.

*Rejection of claims 11-15 and 22-36 under 35 U.S.C. §103(a)  
as unpatentable over the article of recipes for “Crustless Pizza”  
in view of the Google Groups disclosure*

Appellant raises several arguments in support of patentability of the claims, including separate arguments in support of patentability of various dependent claims<sup>6</sup>. These arguments present the following issues for our consideration:

1. Did the Examiner reversibly err in finding the “DEEP DISH PIZZA” recipe of the primary reference discloses a base layer which only includes non-liquid cheese?

2. Are the facts and reasons relied on by the Examiner sufficient to support a finding that one of ordinary skill in the art would have been motivated to modify the base layer of the DEEP DISH PIZZA recipe to include flour and other dry ingredients such as baking powder, and to add such ingredients so as to achieve a specific carbohydrate content for the pizza?

*Issue 1: Did the Examiner reversibly err in finding the “DEEP DISH PIZZA” recipe of the primary reference discloses forming a base layer which only includes non-liquid cheese?*

The DEEP DISH PIZZA recipe discloses a method of making a pizza which includes the steps of: (1) sprinkling Italian cheeses over the bottom of a casserole dish; (2) pouring a mixture of cream cheese, eggs, parmesan, and spices over the cheese; (3) baking for 15 minutes and allowing to stand for 5 minutes; (4) spreading on pizza sauce; (5) sprinkling mozzarella; (6) piling on favorite toppings; and (7) baking.

The Examiner finds the base layer in the DEEP DISH PIZZA recipe is formed in step (1) of the above paragraph, while Appellant contends the base layer

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<sup>6</sup> Claims 12, 13 and 35 (App. Br. 23-26); claims 28 and 30 (*id.* at 28-29); claims 32 and 34 (*id.* at 31-32); and claim 36 (*id.* at 34-35).

is formed by combining the ingredients of the first two steps. (Rep. Br. 4.)

Appellant argues the ingredients of step (2) are a liquid mixture and, therefore, the claim limitations related to Appellant's base layer<sup>7</sup> are not met. (App. Br. 22, 27, 30, 33.)

The respective positions of the Examiner and Appellant appear to be based on a disagreement over the meaning of the claim term "base layer."

During examination, claim terms must be given their broadest reasonable construction consistent with the Specification. *In re ICON Health and Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007). The broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1358 (Fed. Cir. 1999).

As an initial matter, we note Appellant has not identified any evidence which establishes "base layer" is a term of art, or that one of ordinary skill in the art would understand the term "base layer" as referring to a layer formed by baking ingredients in a baking step, such as step (3) of the DEEP DISH PIZZA recipe.

We identify the following Specification disclosure as especially relevant to our interpretation of the claim term "base layer":

[00018] The low carbohydrate crustless pizza of the present invention does not contain a traditional dough/crust layer as does a traditional pizza. . . .

[00019] Instead, the pizza of the present invention has a base layer which is comprised of a formulated flour (dry ingredients) and a cheese mixture. . . .

\* \* \* \*

[00021] To make the pizza of the present invention, the base layer mixture is placed onto a suitable cooking pan or cooking sheet by

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<sup>7</sup> (See claim 11 ("a base layer of non-liquid ingredients"); claim 22 ("wherein said dry formulated flour mixture and said cheese form a base layer"); and claims 27 and 31 ("a base layer consisting essentially of flour and cheese")).

evenly distributing the pre-measured amount of the formulated flour onto a pan and then evenly distributing the pre-measured amount of cheese on top of the formulated flour. Optionally, a pre-measured amount of an additional food product may be evenly distributed on top of the cheese such that it is also a part of the base layer.

Based on the above, we interpret the claim term “base layer” as encompassing any layer which replaces the traditional dough/crust layer of a traditional pizza. The term base layer reads on sub layers of food ingredients, such as a layer of flour, a layer of cheese and a layer of meat. (*See* Spec. [00021] *supra*.) The ingredients need not be baked to form a “base layer” within the meaning of the claims. (*See, e.g.*, Spec. [00021-00027] (describing forming a “base layer,” adding layers, then baking the pizza).)

Having determined the claim term “base layer” does not require baked ingredients, we are in agreement with the Examiner that the Italian cheese layer of the DEEP DISH PIZZA recipe is properly relied on for a teaching of a “base layer” of a pizza. In other words, we are not persuaded the Examiner reversibly erred in finding the “DEEP DISH PIZZA” recipe of the primary reference discloses a base layer which only includes non-liquid cheese.<sup>8</sup>

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<sup>8</sup> In any event, even if the DEEP DISH PIZZA recipe were properly viewed as teaching a base layer that includes the liquid mixture described in step (2) of the recipe, we do not agree with Appellant’s contention that the claim limitations requiring non-liquid, or dry ingredients would not be met. The claims do not preclude baking the base layer ingredients. Baking the combination of ingredients in steps (1) and (2) of the DEEP DISH PIZZA, as required in step (3), would result in a non-liquid layer. We also take this opportunity to note that, contrary to Appellant’s contention (Rep. Br. 7-8), Appellant’s method, as recited in claim 22, does not preclude the additional baking step which would result from the Examiner’s proposed combination of the DEEP DISH PIZZA recipe and the Google Groups disclosure. Where the term “comprising” is used to introduce the



*Issue 2: Are the facts and reasons relied on by the Examiner sufficient to support a finding that one of ordinary skill in the art would have been motivated to modify the base layer of the DEEP DISH PIZZA recipe to include flour and other dry ingredients such as baking powder, and to add such ingredients so as to achieve a specific carbohydrate content for the pizza?*

With respect to independent claims 11, 22, 27, and 31, the Examiner concedes the DEEP DISH PIZZA recipe fails to teach the addition of flour to the base layer. (Ans. 5.) The Examiner maintains it would have been obvious to one skilled in the art to add flour to the Deep Dish Pizza base layer, i.e., a layer of cheese, to obtain different texture and flavor based on the Google Groups disclosure that it was known in the art to make low carbohydrate pizza crust using a little flour and some whey protein. (*Id.* at 5-6.) With respect to argued limitations found in the dependent claims, such as using a specific dry formulated flour mixture in the base layer, comprising high gluten flour and baking powder (claims 12, 28, 32) in specific amounts (claim 13), and formulating a pizza having a specific carbohydrate content (claims 30, 34, 35, 36), the Examiner finds these are known, result effective variables in the art and, therefore, that “[i]t would have been obvious to add baking powder to create bubbling appearance or to give little rising to make a firm structure,” “[i]t would have been obvious to select specific amount of flour depending on the carbohydrate content wanted,” “[i]t would have been obvious to use double acting baking powder when one wants a faster reaction,” etc. (See Ans. 7-8.)

Appellant contends the Examiner’s rejections are based on “a number of conclusory statements which are not supported by the references of record or any other evidence.” (Rep. Br. 4.) Appellant notes the Google Groups disclosure is

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steps in a method claim, there is a presumption that the claim is open to including additional, unrecited steps. *See In re Crish*, 393 F.3d 1253, 1257 (Fed. Cir. 2004).

“minimal” (App. Br. 18) and “so sparse that it is not clear what is disclosed” (Rep. Br. 6), and that the references fail to explicitly teach the limitations found in the dependent claims (*id.* at 7).

Under the flexible obviousness inquiry set forth by the Supreme Court, it is appropriate for the examiner to take account of the “inferences and creative steps,” or even routine steps, that an ordinary artisan would employ. *Ball Aerosol and Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009) (quoting *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 417-18 (2007)).

Appellant’s arguments are not persuasive of error on the part of the Examiner because they fail to fully address the facts and reasons relied on by the Examiner in rejecting the claims. The Examiner’s § 103 rejection is based not only on the explicit teachings of the references, but also on the level of skill and knowledge of the ordinary artisan. (*See, e.g.*, Ans. 11 (“A 103 rejection must take into consideration the level of skill of one in the art. If the recipe is for low carb pizza crust, it would have been readily apparent to one skilled in the art to use very little flour because flour is the main source of carbohydrate in pizza crust.”); and 13 (noting “it is common to add baking powder to product containing flour”).) We view the Examiner’s findings with respect to the knowledge and skill level of the ordinary artisan to be reasonable. We further determine the Examiner’s fact finding and reasoning is sufficient to support a finding that one of ordinary skill in the art would have been motivated to modify the base layer of the DEEP DISH PIZZA recipe to include flour and other dry ingredients such as baking powder, and to add such ingredients so as to achieve a specific carbohydrate content for the pizza.

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Accordingly, we affirm the rejection of claims 11-15 and 22-36 under 35 U.S.C. §103(a) as unpatentable over the article of recipes for “Crustless Pizza” in view of the Google Groups disclosure.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1).

AFFIRMED

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